IN THE

Supreme Court of the United States

No. 71-1583

OCTOBER TERM, 1972

EDMUND G. BROWN, JR., Secretary of State of the State of California,

Appellant,

—v.—

RAYMOND G. CHOTE,

Appellee.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, *AMICI CURIAE*

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Interest of *Amicus Curiae*[1]

The American Civil Liberties Union is a nation-wide, non-partisan organization with over 180,000 members in the United States. Its affiliates in California are the ACLU of Southern California and the ACLU of Northern California. The ACLU is engaged solely in the defense of those principles embodied in the Bill of Rights. During its fifty-two year existence, the ACLU has been concerned with both the integrity of the judicial process and the protection of fourteenth amendment rights from unlawful actions of state officials.

This case presents significant issues concerning the rights of poor persons to use elections and the electoral process

[1] Letters of consent to the filing of this brief have been filed with the Clerk of the Court.

as a means of drawing the public's attention to their plight, to the causes which create poverty and the problems that accompany them, and perhaps to elect representatives who may help end that condition of poverty.

On the issues represented as to the scope of the substantive protections of the 14th amendment, we associate with the ably presented positions of respondent. Our sole purpose is to suggest several additional considerations to guide the Court.

Summary of Argument

The right to participate in the electoral processes, both as a voter and as a candidate, is a fundamental right protected by the Constitution of the United States.

The California Elections Code prevents poor persons from seeking office solely on the basis of wealth. There are no provisions for alternatives to paying filing fees. This requirement prevents a recognizable group of persons from exercising their fundamental right to seek political office solely because of their economic condition.

This Court has held in a number of cases that poor persons cannot be discriminated against solely because of poverty. The lower Court declared California's filing fees unconstitutional based on this Court's decision in *Bullock* v. *Carter* (1972), 405 U.S. 134, which extended the equal protections provisions of the 14th Amendment to the basic and fundamental right to access to the electoral process.

Appellant challenges this interpretation of *Bullock*. Appellant argues that only the reasonableness of the filing fees should be tested; that the test applied should be the "rational basis" test rather than the Court's stricter "com-

pelling state interest" test. To accept Appellant's arguments are to apply a less rigorous test to the political right of access to the political process than to the same poor person's right of access to the Courts for divorces and bankruptcies. The right of access to electoral processes is a basic and fundamental right which requires the application of the stricter "compelling state interest" test.

All of the state's purposes to be accomplished by these filing fees as set forth by Appellant can be achieved by other means without the necessity of depriving poor persons of their right to seek public office. They are legitimate state interests, but the means used to achieve them are neither necessary nor compelling.

ARGUMENT

California's filing fee requirement denies poor persons the right to seek public office solely because of their economic station, and deprives poor people of equal protection of the laws as guaranteed by the 14th Amendment.

A. *The right to participate in the electoral process is a fundamental right.*

The right to vote is one of the most precious and important rights available to people in a democracy, and as such is guaranteed by the United States Constitution. *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966). The Courts have consistently found that the right to vote is included within the category of rights deemed fundamental and necessary. E.g., *Kramer* v. *Union Free School District,* 395 U.S. 621 (1969); *Reynolds* v. *Sims,* 377 U.S.

533 (1964); *Cipriano* v. *City of Houma,* 395 U.S. 701 (1969); *Burrey* v. *Embarcadero Municipal Improvement District,* 5 C.3d 671, 97 Cal. Rptr. 203 (1971).

An important corollary is the right to seek public office. Without meaningful choices of candidates, the right to vote becomes a mere formality. Numerous courts have recognized that this is a fundamental right. *Wong* v. *Mihaly,* 332 F. Supp. 165 (ND Calif. 1971); *Thomas* v. *Mims,* 317 F. Supp. 179 (S.D. Ala. 1970); *Jenness* v. *Little,* 306 F. Supp. 925 (ND Ga. 1969); *Zapata* v. *Davidson,* 24 CA 3d 823; *Fisher* v. *Taylor,* 196 S.W.2d 217 (S. Ct. Ark. 1946); *Zeilenga* v. *Nelson,* 4 Cal. 3d 716 (1971); *Camara* v. *Mellon,* 4 Cal. 3d 714 (1971); *Georgia Socialist Workers Party* v. *Fortson,* 315 F. Supp. 1035 (ND Ga. 1970). See also *State* v. *Wilson,* 150 S.E.2d 592 (S. Ct. of App. W. Va. 1966); *Kautenburger* v. *Jackson,* 333 P.2d 293 (S. Ct. Ariz. 1958); *Williams* v. *Rhodes,* 393 U.S. 30 (1969).

In *Bullock* v. *Carter,* 405 U.S. 134, this Court indicated that it had not theretofore attached the same fundamental status to candidacies as to voting. But, at page 143, the Court said: "However, the rights of voters and the rights of candidates do not lend themselves to meet separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."

B. *Fundamental rights cannot be denied to poor persons solely because of their economic station.*

Once it is determined that the right to be a candidate is a fundamental right, regulations which deny access to public office to a chronically disadvantaged group constitute discrimination and work as a denial of the equal protection of the laws. Filing fees which bear no reasonable relation-

ship to the office being sought or the person's qualification therefore constitute a legislative guarantee that a politically voiceless and invisible minority remain in that disadvantaged condition. But even if such filing fees bore a resemblance to reasonableness, if there are no provisions for that group which cannot afford even such "reasonable" fees, there is a denial of equal protection. Denied access to seek public office, they are deprived of the ability to use elections and electoral processes as a means of drawing the public's attention to their plight, to the causes which create poverty and the problems that accompany them, and thereby perhaps to solutions. *Hobson* v. *Hansen,* 269 F. Supp. 401 (D.D.C. 1967), *aff'd as modified sub nom. Smuck* v. *Hobson,* 408 F.2d 175 (D.C. Cir. 1969).

It should be axiomatic that the State cannot prevent candidates from running for office solely because they cannot afford a filing fee. And some cases have so held. *Zapata* v. *Davidson,* 24 CA 3d 823 (1972); *Wong* v. *Mihaly,* 332 F. Supp. 165 (ND Calif. 1971); *Jenness* v. *Little, supra; Thomas* v. *Mims, supra; State* v. *Drexel,* 105 N.W. 175 (Neb. 1905).

In *Thomas* v. *Mims, supra,* a United States District Court invalidated an Alabama statute requiring a registration fee of 2% of the annual salary for a municipal office, similar to that involved in the instant case. The court affirmed the right to vote and to seek political office as fundamental rights entitled to the protection of the equal protection clause of the 14th amendment.

Three cases including the instant case have been decided in California affirming the right to file for political office without the payment of fees. In *Wong* v. *Mihaly, supra,* municipal filing fees identical to those in question here were

ruled invalid as to poor people. Judge Wollenberg discussed the problem of the serious candidates: "The proposition that every serious candidate will be able to pay the fee required cannot be accepted without question.... There is, in fact, much to suggest that money and seriousness of candidacy are not always to be found in the same office seeker. On the other hand, it is clear beyond question here that the man who cannot pay, no matter how serious he is, cannot place his name in nomination."

In the case of *Zapata* v. *Davidson, supra,* a California Appellate Court ruled that filing fees (under consideration in the instant case) were unconstitutional as applied to a poor candidate.

Bullock, supra, which Appellant would have this Court narrow, involved a Texas system of election fees which were in some instances much higher than California's, but which were also in instances much lower. The one major feature which both systems have in common is that neither State provides alternatives to paying the filing fees in order to qualify for election. As this Court noted in *Bullock* at page 137, "payment of the filing fee is an absolute prerequisite to a candidate's participation in a primary election. There is no alternative procedure by which a potential candidate who is unable to pay the fee can get on the primary ballot by way of petitioning voters, and write-in votes are not permitted in primary elections for public office. Any person who is willing and able to pay the filing fee and who meets the basic eligibility requirements for holding the office sought can run in a primary" (footnotes omitted).

The Court at page 149 also said: "It must be emphasized that nothing herein is intended to cast doubt on the validity

of reasonable candidate filing fees or licensing fees in other contexts. By requiring candidates to shoulder the costs of conducting primary elections through filing fees *and* by providing no reasonable alternative means of access to the ballot, the State of Texas has erected a system which utilizes the criterion of ability to pay as a condition to being on the ballot, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice" (emphasis added).

This describes the situation in California to a tee. Even if a poor person chose to run a write-in campaign, he or she would be required to pay the filing fees before the votes would be counted under Elections Code §6555.[2]

By focusing upon the factor of one's wealth, the California Code results in blatant, invidious and harmful discrimination upon indigent but otherwise qualified persons who seek elective office. This violates the requirements of equal protection of the laws as guaranteed by the 14th Amendment of the Constitution of the United States. While the State may determine voter qualifications and the manner of elections, it must do so in a manner consistent with the equal protection clause.

At a time when the State and Federal Courts have been steadily broadening the equal protection clause of the 14th

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[2] §6555.

"When a person for whom a declaration of candidacy has not been filed is nominated for an office by having his name written on the ballot, he shall pay the same filing fee that would have been required if his declaration had been filed. If he does not pay that fee his name shall not be printed on the ballot at the ensuing general election."

Amendment to insure that poor people are not deprived of the benefits of this society solely because of their lack of wealth, Appellant would have this Court refuse to extend that protection to one of the most important and fundamental rights available to people.

Persons cannot be discriminated against because of poverty. *Griffin* v. *Illinois*, 351 U.S. 12 (1956) (transcripts); *Boddie* v. *Connecticut*, 401 U.S. 388 (1971) (divorce); *Harper* v. *Virginia Board of Elections, supra* (poll tax); *Tate* v. *Short*, 401 U.S. 395 (1970) (parking fines); *In re Kraus*, 331 F. Supp. 1207 (1971) (bankruptcy).

In California, the courts have been cognizant of the principle that persons cannot be discriminated against solely because of the lack of wealth. *In re Fry*, 19 C.A. 3d 177 (1971). They have been zealous in protecting the rights of the poor.

In *Ferguson* v. *Keays*, 4 C.3d 649, 94 Cal. Rptr. 398, 484 P.2d 70 (1970), the California Supreme Court approved in principle the waiver of the $50.00 fee for filing a record on appeal despite the argument that filing fees defray the cost of courts and discourage unnecessary litigation, the same argument advanced by Appellant.

The California Supreme Court has also defined classification based upon wealth as a violation of the equal protection clause in *Serrano* v. *Priest*, 5 C.3d 584, 96 Cal. Rptr. 601 (1971). At page 597, the Court said: "In recent years, the United States Supreme Court has demonstrated a marked antipathy toward legislative classifications which discriminate on the basis of certain 'suspect' personal characteristics. One factor which has repeatedly come under close scrutiny of the high court is wealth. 'Lines

drawn on the basis of wealth or property, like those of race . . ., are traditionally disfavored.'"

In *Burrey* v. *Embarcadero Municipal Improvement District,* 5 C.3d 671, 97 Cal. Rptr. 203 (1971), the California Supreme Court declared unconstitutional the denial of voting rights to non-property holders in the election of directors to a municipal district. The Court held at page 679 that a legislative classification which discriminates on the basis of wealth "can be sustained, if at all, only by the most compelling of state interests."

Finally as indicated above, a California Appellate Court in *Zapata* v. *Davidson, supra,* has ruled that the same filing fees in question in the instant case were unconstitutional as to plaintiff who was a poor person.

The rights which the Courts have protected in the foregoing cases range from use of the Courts for appeals, divorces, bankruptcy, to voting rights, abolishing of poll taxes. Poor persons may now appeal without paying fees, obtain divorces, and go through bankruptcy. Surely the right to run for office is at least as important as those rights.

C. *The "rational basis" test is not applicable here.*

This Court has developed two standards to measure constitutionality within the framework of equal protection of the laws. Under the general standard, sometimes called the "rational basis" test, the Court examines different treatment to see whether the difference has any rational relationship to a legitimate public policy. E.g., *Levy* v. *Louisiana,* 391 U.S. 68 (1968); *McGowan* v. *Maryland,* 366 U.S. 420 (1961); *Morey* v. *Doud,* 354 U.S. 457 (1957). On the other hand, in cases involving "suspect classifications"

touching upon "fundamental interests and rights," the Court has invoked a much stricter standard. In such cases, the classification is considered invidious, and government officials are required to justify such differences by a "compelling" interest. E.g., *Shapiro* v. *Thompson*, 394 U.S. 613 (1969); *Levy* v. *Louisiana, supra; Rinaldi* v. *Yeager*, 384 U.S. 305 (1966); *Reynolds* v. *Sims, supra; Skinner* v. *Oklahoma*, 316 U.S. 535 (1942).

In *Williams* v. *Rhodes, supra*, this Court devised a test which included as important elements: (1) the facts and circumstances behind the law, (2) the interest which the state claims to be protecting, and (3) the interests of those who are disadvantaged by the classification.

Appellant urges that the standard to be used in determining the constitutionality of the state's elections code should be the general standard. But to apply the general standard to the question of access to the electoral process is to ignore the whole body of case law cited heretofore establishing the right to seek office as a fundamental and basic right.

Appellant urges that the state has legitimate interests which are "reasonably necessary." And in defense of the California Elections Code cites (pp. 14-15) extensively from *Socialist Party* v. *Uhl*, 155 C. 776, 103 P. 181 (1909). However, Appellant did not cite extensively enough because that Court at pages 790 and 791 went on to discuss the California fees, then $10.00 to $50.00, and stated that they were "fixed at an amount that will impose no hardship upon any other person for whom there should be any desire to vote." The Court then discussed decisions in other states, and pointed out at page 791 that the fees which had been so disapproved called for "the payment of a fee

based on the emoluments of the office to which the candidate aspires, and, in the second case, the fee was made to correspond with the importance of the office from the standpoint of dignity and influence, as well as from the standpoint of emolument." Perhaps if that Court had been faced with California's present fee system of 2% of the salaries or "emoluments" of the office, the decision would have been different. Indeed, the later California cases which we have above discussed make the present standing of the case dubious.

Appellant argues that the state's reasons for the fees are to avoid an indiscriminate scramble for office, limiting the size of the ballot to avoid voter confusion and fragmentation of votes, and to defray at least a portion of the cost of elections. In *McLaughlin* v. *Florida*, 379 U.S. 184 (1964), this Court indicated that the collection of revenue was a legitimate interest of the state. However, to qualify as a compelling state interest, the law must be "necessary and not merely rationally related to the accomplishment of a permissible state policy." To the same effect is *Carter* v. *Wischkaemper*, 321 F. Supp. 1358 (N.D. Tex. 1970).

The California Legislature included its intentions in Elections Code §6556 "that the funds deposited in the General Fund pursuant to this section will be used to support the State Commission on Voting Machines and Vote Tabulating Devices to the extent that appropriations are made in the Budget Act from year to year." However, no appropriations have ever been made, and it is obvious that the fees are a mere revenue raising device. Appellant also indicates this as one of the stated objectives.

Filing fees as a means of raising revenue are notoriously deficient, weighing the small amount of revenue available to the state as opposed to the very heavy burdens placed upon the individuals who wish to exercise their constitutionally protected rights to vote and run for office. At least 18 states, including Colorado, Indiana, Illinois, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee and Vermont, have no filing fees. If these states, including some of the largest in the country, do not find it even "necessary" to use elections to collect revenue, it can hardly be argued that California is compelled to use this method.

Likewise with the other stated objections; they are not so compelling or necessary that the rights of poor persons to participate in the electoral process should be compromised. All of these stated objectives can be accomplished through other means without depriving poor persons of their constitutional rights.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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